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09/737,649	12/15/2000	Susan Brownbill	J3519(C)	2275

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EXAMINER

ELHILO, EISA B

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 19

Application Number: 09/737,649
Filing Date: December 15, 2000
Appellant(s): BROWNBILL ET AL.

Michael Paul Aronson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed March 10, 2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

The brief does not contain a statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief. Therefore, it is presumed that there are none. The Board, however, may exercise its discretion to require an explicit statement as to the existence of any related appeals and interferences.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The amendment after final rejection filed on 3/10/2003 has been entered.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows: Whether claims 1-12, 15 and 16 are obvious under 35 U.S.C. 103(a), over Lim et al. (U.S. Patent 5,961,666). Whether claims 1-12, 15 and 16 are obvious under 35 U.S.C. 103(a), over Anderson et al. (U.S. Patent 5,851,237).

(7) *Grouping of Claims*

The appellant's statement in the brief that certain claims do not stand or fall together is not agreed with because claim 7, recites a hair coloring composition comprising the hair bleaching composition of claim 1. Also claim 8 recites a method for coloring hair wherein the method comprises applying to the hair a composition of claim 7, which is dependent on claim 1

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(bleaching composition). Further, claim 15 recites a method for treating hair with bleaching and/or coloring compositions. Therefore, all claims stand or fall together.

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

US 5,961,666	Lim et al.	10-1999
US 5,851,237	Anderson et al.	12-1998

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

- I Claims 1-12, 15 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lim et al. (US 5,961,666). This rejection is set forth in prior Office Action, Paper No. 13.
- II Claims 1-12, 15 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson et al. (US 5,851,237). This rejection is set forth in prior Office Action, Paper No. 13.

In rejection I, Lim (US' 666) teaches a composition comprising oxidizing agent such as hydrogen peroxide (see col. 4, line 42), ammonium hydroxide as a buffering agent (see col. 6, line 5), cholesterol (see col. 3, line 48) and surfactants (see col. 3, lines 40-41). Lim also teaches a dyeing composition having a pH in a range of 5 to 11, which is overlapped with the claimed range (see col. 6, lines 1-2). Lim also teaches a method for dyeing hair as claimed. The method comprises the step of mixing the hair dyeing preparation with an oxidant shortly before use, or at the time of applying the mixture onto the hair (see col. 6, lines 21-23). Lim further, teaches kits that provide containers for housing the dye precursors and oxidizing agents (see col. 6, lines 49-63).

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The reference is silent about teaching a hair bleaching composition as claimed in claims 1-5, method for bleaching hair as claimed in claims 6 and 10 or a hair bleaching kit as claimed in claim 9.

However, the reference teaches and discloses a composition comprising peroxygen compound, buffering agent and cholesterol wherein the composition having a pH in the range of 5 to 11. The reference further, referred to the composition as a dyed bleached composition (see col. 7, Table 2 lines 45).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to be motivated to use such a composition for bleaching hair by excluding the coloring compound because the reference teaches similar ingredients to those recited by the claims suitable for inclusion in a bleaching composition and, thus, a person of ordinary skill in the art would expect such a composition to have similar properties to those claimed, absent unexpected results.

In rejection II, Anderson (US' 237) teaches a method for oxidative hair dye and dye composition. The dye composition comprises oxidizing agent such as hydrogen peroxide (see col. 9, lines 2-3), quaternary ammonium compounds as a buffering agent (see col. 9, lines 37-39), cholesterol (see col. 8, line 6), surfactants (see col. 7, line 67). Anderson also teaches a composition having a pH in a range of 5 to 11, which is overlapped with the claimed range (see col. 10, lines 41-42). Anderson also teaches a method for dyeing hair. The method comprises the step of mixing the hair dyeing preparation with an oxidant shortly before use, or at the time of applying the mixture onto the hair (see col. 10, lines 58-61). Anderson further, teaches kits that

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provide containers for housing the dye precursors and oxidizing agents as claimed in claims 9 and 11 (see col. 11, lines 36-44).

The reference is silent about teaching a hair bleaching composition as claimed in claims 1-5, method for bleaching hair as claimed in claims 6 and 10 or a hair bleaching kit as claimed in claim 9.

However, the reference teaches and discloses a composition comprising peroxygen compound, buffering agent and cholesterol as claimed wherein the composition having a pH in the range of 5 to 11. The reference further, teaches that due to the presence of oxidizing agent in the composition that some of the natural melanin properties of the hair may be bleached (see col. 1, lines 33-35).

Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to be motivated to use such a composition for bleaching hair by excluding the coloring compound because the reference teaches similar ingredients to those recited by the claims suitable for inclusion in a bleaching composition. The reference further, referred to the composition as a bleached composition due to the consequence of the oxidizing properties of the oxidizing agent (see col. 1, lines 33-35) and, thus, a person of ordinary skill in the art would expect such a composition to have a bleaching properties similar to those claimed, absent unexpected results.

(11) *Response to Argument*

The examiner has reviewed appellants' arguments and respectfully disagrees with the counsel's allegations. Specifically, appellants argue that the teachings of the references are related to the dyeing compositions and there is no teaching of bleaching compositions as

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claimed. Further, the appellants argue that both references prefer compositions having a pH between 8 and 10, and therefore, one of ordinary skill in the art would have concluded that these references had not found a solution to the well documented problem of damage by pH > 10 bleaching solutions apart from keeping the pH below 10, and indeed one is mentioned.

The examiner position is such that the arguments are not found persuasive because of the following reasons.

In establishing a *prima facie* case of obviousness, three criteria must be met. See *in re Vaeck*, 947 F2d. 488, 20 USPQ 2d 1438 (Fed. Cir. 1991). First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. (see MPEP 2143).

In this case the three criteria have been met, because Lim (US' 666) teaches a hair dyeing composition comprising hydrogen peroxide as a peroxygen compound (see col. 4, line 42), ammonium hydroxide as a buffering agent (see col. 6, line 5) and cholesterol (see col. 3, line 48) wherein the composition having a pH in the range of 5 to 11 which is overlapped with the claimed range (see col. 6, lines 1-2). Lim further teaches a method for dyeing hair comprising the step of mixing the hair dyeing composition with an oxidant shortly before use, or at the time of applying the mixture onto the hair (see col. 6, lines 21-23). Lim further, teaches kits that provided containers for housing the dye precursors and oxidizing agents as claimed (see col. 6, lines 49-63), and, thus, a person of the ordinary skill in the art would be motivated to use such a composition for bleaching hair by excluding the coloring agent because the reference teaches and

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discloses a composition having similar properties to those claimed. Further, claim 15, recites a method for reducing damage to hair comprising treating hair with bleaching and/or coloring compositions which implies that the coloring or bleaching compositions have equivalent functionality. Furthermore, both references teaches and discloses compositions comprising cholesterol wherein the compositions having pHs in the ranges of 5 to 11 which allow the compositions to be suitable for beaching at high pHs (greater than 10) without damaging the hair due to the presence of the cholesterol. Therefore, the prima facie case of obviousness has been established.

Accordingly, the Office maintains that the Examiner has met the burden to establish the prima face showing of obviousness. Viewed as a whole, the invention as claimed would have been obvious to one of ordinary skill in the art at the time of the invention.

Finally, the Examiner request that this Board when viewing the evidence as a whole, and lacking any secondary indicia of nonobviousness, affirm the decision of the Examiner in whole.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Eisa Elhilo
May 2, 2003

Conferees
Dr. Yogendra Gupta (SPE 1751)
Mr. Pat Ryan (SPE 1745)

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